
**A PARENT’S UNDOCUMENTED IMMIGRATION STATUS
SHOULD NOT BE CONSIDERED UNDER THE BEST
INTEREST OF THE CHILD STANDARD**

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I. INTRODUCTION

In 2000, the Office of Immigration Statistics under the Department of Homeland Security estimated that 8.5 million unauthorized immigrants resided in the United States.¹ Over the next seven years, an additional 3.3 million unauthorized immigrants entered the country.² With 11.8 million unauthorized immigrants in the United States as of January 2007,³ American courts increasingly encounter complicated immigration issues, often not previously addressed by either state or federal courts.

In particular, courts are confronted with cases involving custody of children when one parent is undocumented. In Minnesota, the custody statute lists several factors the court must consider in deciding custody cases.⁴ A Minnesota court need not consider the issue of an undocumented parent's status.⁵ Courts throughout the United States have dealt differently with this issue.⁶ Some courts expressly refuse to consider a parent's immigration status, or insist on doing so, while other courts simply do so without explanation.⁷ The issue of whether a court should consider a parent's immigration status in a custody determination falls within the intersection of three major realms of law: family law, immigration law, and international law.⁸

This article first emphasizes the intersection of family and

1. MICHAEL HOEFER, NANCY RYTINA & BRYAN C. BAKER, OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRATION POPULATION RESIDING IN THE UNITED STATES: JANUARY 2007, 1 (2008), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2007.pdf.

2. *See id.*

3. *Id.*

4. MINN. STAT. § 518.17(1)–(2) (2006).

5. *Id.*

6. *See infra* Part IV.E.

7. *See infra* Part IV.E.

8. *See infra* Parts II, V.

immigration law.⁹ In this section, the goals of each area of law are highlighted to show their similarities and differences.¹⁰ This is not meant to be a comprehensive comparison, but one that is pertinent to the issue at hand. The article then discusses *Olupo v. Olupo*,¹¹ a Minnesota Court of Appeals case that considered the mother's immigration status in rendering a custody determination.¹² Third, the article covers mixed-status families with citizen children, including a discussion of birthright citizenship regardless of parents' status,¹³ the fears mixed-status families face,¹⁴ and removal and relief for the undocumented alien.¹⁵

The fourth section introduces the four categories under which family court decisions treat immigration status¹⁶ and how various states address immigration status in custody determinations.¹⁷ In this section, the article's focus shifts to how Minnesota has statutorily addressed custody determinations,¹⁸ followed by further analysis of the *Olupo* decision.¹⁹ The article continues with a discussion of the role of international law in family law and immigration matters.²⁰ This section covers domestic laws prohibiting child abduction,²¹ the Hague Convention's international remedy for child abduction and its limitations,²² and prevention measures required when a parent is a flight risk.²³

Finally, with a better developed understanding of the intersection of immigration and family law issues, the article concludes with arguments that highlight the benefits and drawbacks of judicial consideration of a parent's immigration status in custody determinations.²⁴ The article ultimately concludes that a court should not consider a parent's immigration status in a custody determination because the best interest of the child

9. See *infra* Part II.

10. See *infra* Part II.A–B.

11. No. C8-02-109, 2002 WL 1902892, at *1 (Minn. Ct. App. Aug. 20, 2002).

12. See *infra* Part II.C.

13. See *infra* Part III.A.

14. See *infra* Part III.B.

15. See *infra* Part III.C.

16. See *infra* Part IV.B.

17. See *infra* Part IV.E.

18. See *infra* Part IV.A.

19. See *infra* Part IV.D.

20. See *infra* Part V.

21. See *infra* Part V.A.

22. See *infra* Part V.B–C.

23. See *infra* Part V.D.

24. See *infra* Part VI.A–B.

standard, used to determine which parent is better suited to have custody of a child, would be superseded by a parent's immigration status.²⁵

II. THE INTERSECTION OF FAMILY LAW AND IMMIGRATION

Determining which parent has custody of a child is within the state court's jurisdiction.²⁶ The state court, however, does not have jurisdiction over the parent's immigration status, which falls under federal court jurisdiction.²⁷ The intersection of family law and immigration law is particularly consequential when there is a custody dispute involving an undocumented alien who has a child with U.S. citizenship. The intersection of family and immigration law, and their individual complexities, creates difficult challenges for the court.

A. *Overview of Family Law*

Family law, a state-governed realm, has traditionally protected the family unit under the Constitution.²⁸ The family unit is defined as "a unit with broad parental authority over minor children."²⁹ The concept of the "family unit" as a "natural and fundamental . . . unit of society . . . entitled to protection by society and the State" is well-recognized among international treaties and laws.³⁰ While the U.S. Constitution does not explicitly refer to "family,"³¹ the Constitution protects the concept of family because it is rooted within the history and tradition of the United States.³²

The U.S. Supreme Court has recognized a protected liberty

25. See *infra* Part VI.C.

26. See *e.g.*, MINN. STAT. § 518D.201(a) (2006).

27. See 8 U.S.C. § 1329 (2006).

28. See David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1174 (2006).

29. *Id.* at 1175 (quoting *Parham v. J.R.*, 442 U.S. 584, 602 (1979)).

30. Universal Declaration of Human Rights art. 16(3), G.A. Res. 217A, at 71, U.N. Doc A/810 (Dec. 10, 1948), available at <http://www.unhchr.ch/udhr/lang/eng.htm>; International Covenant on Civil and Political Rights art. 23(1), 999 U.N.T.S. 171 (Dec. 16, 1966), available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm; see also International Covenant on Economic, Social and Cultural Rights art. 10(1), 999 U.N.T.S. 3, U.N. Doc. A/6316 (Dec. 16, 1966), available at http://www.unhchr.ch/html/menu3/b/a_ceschr.htm.

31. Thronson, *supra* note 28, at 1174.

32. *Moore v. City of E. Cleveland*, 431 U.S. 494, 503-04 (1977); see also *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (holding that the state cannot enter the right to family life).

interest “of parents in the care, custody, and control of their children . . . [as] perhaps the oldest of the fundamental liberty interests. . . .”³³ Because of that interest, parents are allotted great range of authority and responsibility under the right to due process for their minor children who lack the ability to make certain choices alone. In order to protect family integrity, it is established that the parent-child relationship should be free from governmental interference.³⁴ Therefore, the U.S. Constitution limits the states’ ability to regulate the family unit.³⁵ One of the rights afforded to parents under the Due Process protections of the Constitution is the right to “establish a home and bring up children”³⁶

There are situations, however, in which the state intervenes in familial matters. For example, while a parent has the right to establish and decide the living situation of a child, if parents are involved in a custody dispute and cannot find an amicable settlement, the courts will intervene and decide what is in the best interest of the minor child.³⁷ Thus, parental rights are protected unless it is necessary for the court to intervene.³⁸

B. *Overview of Immigration Law*

Immigration law, a federally-based system, has very specific definitions that pertain to family. Immediate family members are defined in the Immigration and Nationality Act (“the Act”) as children, spouses, and parents of a citizen of the United States.³⁹ The Act also provides a very specific definition for “child,” which only applies to unmarried persons under twenty-one years of age.⁴⁰ These definitions control the flow of immigrants into the United

33. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

34. *Thronson*, *supra* note 28, at 1174 (explaining that the Supreme Court has consistently interpreted the Constitution to protect family relationships from state interference).

35. See Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 688 (2001).

36. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); accord *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–535 (1925) (holding that parents and guardians have the right to “direct the upbringing and education of children under their control”).

37. MINN. STAT. § 518.17(1)–(2) (2006).

38. *Thronson*, *supra* note 28, at 1165.

39. Immigration and Nationality Act (INA) § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2006).

40. INA § 101(b), 8 U.S.C. § 1101(b)(1) (2006).

States by creating a hierarchy of preference for certain familial relationships, thereby determining the family members who can be included and excluded in a family-based sponsorship.⁴¹

Immigration policies are similar to those of family law because they have long purported the goals of family integrity through “family reunification”⁴²—a method of obtaining citizenship in the United States.⁴³ There is, however, an inherent conflict between the right to family reunification and the right of the state to control immigration and enforce the federal laws of the United States.⁴⁴ “The vindication of immigration law goals often results in the compromise of family integrity, and achievement of family integrity often can be accomplished only in violation of immigration laws.”⁴⁵ Therefore, when the family unit is compromised through separation or divorce, the issue of a parent’s undocumented status, which is necessary to achieve family integrity, becomes pronounced.

C. *The Intersection of Family and Immigration Law in Olupo v. Olupo*

Jefta Olupo and Olufunmilayo Adetoun Denise Olupo were married in Nigeria on May 5, 1990; they moved to Minnesota and had two children in 1990 and 1993.⁴⁶ In 1994, Mr. Olupo, a legal permanent resident of the United States, and Mrs. Olupo, a citizen of Nigeria with unclear status, decided to dissolve their marriage,

41. See INA § 203(a), 8 U.S.C. § 1153(a) (2006).

42. See generally INA § 201, 8 U.S.C. § 1151 (2006) (explaining the four basic ways to obtain citizenship in the United States: a family-based petition; an employment-based petition; through the diversity lottery; or through asylum).

43. MICHAEL FIX, WENDY ZIMMERMAN & JEFFREY S. PASSEL, URBAN INST., *THE INTEGRATION OF IMMIGRANT FAMILIES IN THE UNITED STATES* 7 (2001), available at http://www.urban.org/UploadedPDF/immig_integration.pdf [hereinafter *INTEGRATION OF IMMIGRANT FAMILIES*]. Family reunification has been emphasized through the use of a family-based system that gives preference to “immediate relatives” as defined by the Immigration and Nationality Act. See INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i). A 1998 immigration study shows that even the employment and diversity based immigration systems are driven by familial reunification since 80 percent of all immigrant admission entered to join family members. *INTEGRATION OF IMMIGRANT FAMILIES*, *supra* at 7–8.

44. See Nora V. Demleitner, *How Much Do Western Democracies Value Family and Marriage?: Immigration Law’s Conflicted Answers*, 32 *HOFSTRA L. REV.* 273, 296 (2003) (“In receiving certain family members but not others, the immigration law of the countries of destination shapes the composition of the family . . .”).

45. Thronson, *supra* note 28, at 1165.

46. *Olupo v. Olupo*, No. C0-98-2348, 1999 WL 451750, at *1 (Minn. Ct. App. July 6, 1999).

reserving issues of custody and visitation for their two children.⁴⁷ In 1997, a dispute arose between the parties regarding the treatment of one of the children and in response to that dispute, the district court appointed a guardian ad *litem* to make custody recommendations.⁴⁸ Over the next two years, the court twice ordered the mother to surrender her passport and both times she refused for reasons not outlined in the decision.⁴⁹ Finally in August of 1999, the court placed the children in the sole custody of the father, while the mother received supervised visitation.⁵⁰ The mother's requests for review of the decisions were denied.⁵¹ In 2001, the guardian ad *litem* reviewed the situation and recommended visitation to the court because it was not in the children's best interest to have only limited contact with their mother.⁵² The decision does not discuss the reasons for the guardian ad *litem*'s recommendation. While visitation was recommended by the *guardian ad litem*, the visitation included the following restrictions: "(1) registering the children with the state department; (2) requiring [the mother] to surrender her passport to the court; and (3) educating the children about what to do if [their mother] flees with them."⁵³ The court did not, however, adopt the recommendations and the mother appealed.⁵⁴

In its decision, the district court determined that the children were thriving under the present order and that it was in their best interest to remain with their father.⁵⁵ This determination was based on the court's finding that the mother was a flight risk; it gave the following reasons to support this finding: (1) her ability to falsify documents; (2) her failure to relinquish her passport to the court; (3) her frequent moves with the children without notification; (4) her *unclear immigration status*; and (5) her lack of ties to Minnesota.⁵⁶

47. *Olupo v. Olupo*, No. C8-02-109, 2002 WL 1902892, at *1 (Minn. Ct. App. Aug. 20, 2002). An asylum claim was also pending for Appellant-mother. *Id.*

48. *Olupo*, 1999 WL 451750, at *1.

49. *See Olupo*, 2002 WL 1902892, at *1-2 (explaining that in October 1997 both parties were ordered to surrender their passports and in March 1998 the court ordered mother to provide her passport to father's counsel).

50. *Id.* at *1.

51. *Id.*

52. *Id.* at *2.

53. *Id.*

54. *Id.*

55. *Id.* at *3.

56. *Id.* (emphasis added). Particularly, the court noted that Nigeria was not a

The reference to “unclear immigration status” indicates that immigration law was in fact considered in the outcome of the Minnesota family court’s decision. It is unclear, however, if the court’s decision was based more on the mother’s refusal to follow the court order rather than on her immigration status.

III. MIXED-STATUS FAMILIES WITH CITIZEN CHILDREN

A. *Birthright Citizenship Regardless of Parents’ Status*

An alien is defined as “any person not a citizen or national of the United States.”⁵⁷ An unauthorized or undocumented alien refers to a person who has entered the United States without inspection or who was admitted temporarily and overstayed his or her authorized stay in the United States.⁵⁸ The Office of Immigration Statistics under the Department of Homeland Security estimated that 11.8 million unauthorized immigrants were residing in the United States in January 2007.⁵⁹

While the highest numbers of immigrants are concentrated on the coasts of the United States and the U.S.–Mexico border, Minnesota has seen a rise in immigrants as well. The 2006 U.S. Census Bureau estimates the foreign-born population in Minnesota as 339,236 residents, comprising 6.6 percent of the total Minnesota population of 5,167,101.⁶⁰ While it is difficult to find exact numbers for the undocumented population, the estimates fall between 55,000 and 85,000 in Minnesota, averaging 30–39 percent of the foreign-born population.⁶¹

signatory to the Hague Convention. *Id.*

57. INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2006).

58. Steven C. Thal, *7 Things Every Family Law Lawyer Should Know About Immigration Law*, in THE 26TH ANNUAL FAMILY LAW INSTITUTE, MINNESOTA STATE BAR ASSOCIATION, CONTINUING LEGAL EDUCATION (2005).

59. HOEFER, RYTINA & BAKER, *supra* note 1, at 1.

60. U.S. Census Bureau, American Fact Finder, Fact Sheet: Minnesota, http://factfinder.census.gov/servlet/ACSSAFFacts?_event=Search&geo_id=&_geoContext=&_street=&_county=&_cityTown=&_state=04000US27&_zip=&_lang=en&_sse=on&pctxt=fph&pgsl=010 (last visited Nov. 14, 2008).

61. Jeffrey S. Passel, *Estimates of the Size and Characteristics of the Undocumented Population*, PEW HISPANIC CENTER 6 (2005), available at <http://pewhispanic.org/files/reports/44.pdf>. There are great discrepancies in the estimated number of undocumented immigrants in Minnesota. Jeffrey Passel at Pew Hispanic Center estimates between 55,000 and 85,000. *Id.* A report commissioned by Governor Tim Pawlenty estimated the number of undocumented to be between 80,000 and 85,000. See THE OFFICE OF STRATEGIC PLANNING & RESULTS MANAGEMENT, MINN.

While undocumented immigrants should be afforded all human rights as set out in the Universal Declaration of Human Rights,⁶² they are not privy to the rights and aid that are afforded to those with legal status in the United States.⁶³ Under Minnesota state benefits, undocumented immigrants may receive some medical care assistance⁶⁴ and some food assistance.⁶⁵ If they are not qualified, however, undocumented aliens are ineligible for nearly all federal benefits.⁶⁶ For example, undocumented aliens are barred “from receiving government assistance for health care beyond emergency care, immunization and treatment for communicable diseases.”⁶⁷

Still, any children of undocumented immigrants born on American soil are legally considered U.S. citizens.⁶⁸ Throughout the history of the United States, a fundamental and widely accepted legal principle governing citizenship is that a child born within the territorial limits of the United States obtains citizenship.⁶⁹ This is

DEP'T OF ADMIN., THE IMPACT OF ILLEGAL IMMIGRATION ON MINNESOTA 7 (2005), available at http://www.state.mn.us/mn/externalDocs/Administration/Report_The_Impact_of_Illegal_Immigration_on_Minnesota_120805035315_Illegal%20Immigration%20Brief%2026.pdf. *Contra* Barbara J. Ronningen, *Estimates of Selected Immigrant Populations in Minnesota: 2004*, MINN. STATE DEMOGRAPHIC CTR. (2004), available at <http://www.demography.state.mn.us/PopNotes/EvaluatingEstimates.pdf> (arguing that the estimate is closer to 55,000 based on her research).

62. Universal Declaration of Human Rights, *supra* note 30.

63. See THE ADVOCATES FOR HUMAN RIGHTS, THE FACTS: IMMIGRATION AND HUMAN RIGHTS (2006), http://www.energyofanation.org/sites/25e1f498-741c-478a-8a08-aa486d8533a5/uploads/Immigration_and_Human_Rights.pdf.

64. KATHY McDONOUGH, LEGAL SERVICES ADVOCACY PROJECT, NON-CITIZENS: ELIGIBILITY FOR MINNESOTA'S HEALTHCARE PROGRAMS, <http://www.smrls.org/documents/139241Immigrant%20MA.htm> (last visited Nov. 14, 2008). Undocumented immigrants are allowed some general assistance medical care, specifically in the form of pre- and post-natal care. *Id.* They must cooperate with immigration to obtain a qualified status or pursue citizenship. *Id.*

65. MINN. STAT. § 256D.053, subdiv. 2(1) (2006).

66. See 8 U.S.C. § 1641(b) (2006) (defining what “qualified” status confers).

67. Cindy Chang, *Health Care for Undocumented Immigrant Children: Special Members of an Underclass*, 83 WASH. U. L.Q. 1271, 1272 (2005).

68. 8 U.S.C. § 1401 (2006).

69. See *Lynch v. Clarke*, 1 Sand. Ch. 584 (N.Y. Ch. 1844) (holding that a young woman born in 1819 of alien parents was a citizen); see also *United States v. Wong Kim Ark*, 169 U.S. 649, 653 (1898) (holding that Chinese persons born in the United States are “subject to the jurisdiction thereof” in the same sense that all children born in the United States to aliens are “subject to the jurisdiction thereof”) (quoting U.S. CONST. amend. XIV, § 1); *Maranek v. Sch. Dist. No. 40, Houston County*, 71 Minn. 311, 318, 73 N.W. 956, 959 (1898) (holding that “a person born in this country, though of alien parents, who had never been

confirmed in the Fourteenth Amendment of the United States, which places the right to citizenship based on birth, ensuring that “all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”⁷⁰ In *United States v. Wong Kim Ark*, the Supreme Court held that a child born in the United States, whose parents were aliens subject to the emperor of China, was allowed birthright citizenship.⁷¹

This is the application of the principle known as *jus soli*, which specifies that a person acquires nationality by simply being born within the territory of a state.⁷² Under *jus soli*, non-citizens are subject to the jurisdiction of the sovereign where they are born, and a parent’s temporary or illegal presence in the United States will not prevent his or her children from obtaining U.S. citizenship if they are born in the United States.⁷³

While undocumented aliens do not share the rights and responsibilities associated with American citizenship, their American born children do share citizenship rights. A U.S. citizen child of an illegal alien can benefit from utilizing the opportunities offered in America. For example, in Minnesota, the citizen child is eligible for state benefits such as the Minnesota Family Investment Program, food stamps, and medical benefits; however, the parent must apply for these benefits.⁷⁴ In addition to state benefits, citizen children of undocumented aliens are eligible for federal programs, economic opportunities, public life, work without exploitation, educational benefits, full protection under U.S. laws, and benefits under the welfare state.⁷⁵

naturalized, is deemed to be a citizen under the laws of the United States”).

70. U.S. CONST. amend. XIV, § 1; see 8 U.S.C. § 1401(a) (2006).

71. *Wong Kim Ark*, 169 U.S. at 676–77.

72. Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 YALE J.L. & HUMAN. 73, 77 (1997). There are two main principles that govern immigration laws internationally—*jus soli* and *jus sanguinis*. *Id.* Under the principle of *jus soli*, which is utilized in the United States, a person acquires citizenship by birth within the jurisdiction of the state. *Id.* Whereas under *jus sanguinis*, utilized by many European countries, regardless of the place of birth, nationality is acquired by descent (usually through the father). *Id.*

73. Daniel Levy, NAT’L LAWYERS GUILD, NAT’L IMMIGRATION PROJECT, U.S. CITIZENSHIP AND NATURALIZATION HANDBOOK § 2.2 (2006); see also *Wong Kim Ark*, 169 U.S. at 693–94.

74. LEGAL AID SOCIETY OF MINNEAPOLIS, PUBLIC BENEFITS FOR NON-CITIZENS, FACT SHEET I-2, at 4 (Fall 2008), available at <http://www.lawhelp.org/documents/2325911-2%20Public%20Benefits%20for%20Non-Citizens.pdf?stateabbrev=/MN/>.

75. Adam C. Abrahms, *Closing the Immigration Loophole: The 14th Amendment’s*

In recent years, in response to the rise in illegal immigration, lawmakers have debated the principles of birthright citizenship for the children of undocumented aliens.⁷⁶ There have been several attempts to halt the extension of birthright citizenship to these children,⁷⁷ the two most recent being the Birthright Citizenship Act of 2007⁷⁸ and its predecessor, End Birth Citizenship to Illegal Aliens Act of 2006.⁷⁹ These bills would amend section 301 of the Immigration and Nationality Act to consider “a person born in the United States ‘subject to the jurisdiction’ of the United States” for citizenship at birth if the person is born in the United States with at least one parent who is: (1) a U.S. citizen or national; (2) a lawful permanent resident alien whose residence is in the United States; or (3) an alien actively serving in the armed forces.⁸⁰ This proposed bill stems from constitutional issues since the question is attached to the interpretation of the Fourteenth Amendment.⁸¹

Those in favor of the legislation claim that the language of the Fourteenth Amendment excludes children of aliens because they are “not subject to U.S. jurisdiction.”⁸² Supporters of the aforementioned bill and other similar bills suggest that the Amendment has been misapplied, and was never intended to grant citizenship automatically to those born to illegal immigrants.⁸³ Supporters view the current birthright citizenship as an unsanctioned loophole in immigration law that is a magnet for undocumented immigrants to use children as “anchor babies”⁸⁴ and take advantage of the current system.⁸⁵ Tied to the much-heated debate on illegal immigration in the United States, supporters see the connection between spending money on education, medical assistance, prisons, and courts, and view

Jurisdiction Requirement, 12 GEO. IMMIGR. L.J. 469, 471–72 (1998).

76. James C. Ho, *Defining “American” Birthright Citizenship and the Original Understanding of the 14th Amendment*, 9 GREEN BAG 2D 367, 367–68 (2006).

77. See Natalie Smith, *Developments in the Legislative Branch*, 20 GEO. IMMIGR. L.J. 325 (2006).

78. H.R. 1940, 110th Cong. (2007).

79. H.R. 6294.IH, 109th Cong. (2006).

80. H.R. 1940, § 2.

81. See *id.* § 2(b).

82. *Id.*

83. Associated Press, *Birthright Citizenship Debate Set to Begin*, Dec. 26, 2005, available at <http://www.msnbc.msn.com/id/10609068/>.

84. Smith, *supra* note 77, at 327. The term “anchor baby” infers the right of a twenty-one-year-old American citizen to sponsor parents for legal permanent residence. *Id.*

85. Abrahms, *supra* note 75, at 469.

birthright citizenship as a reward for violating United States immigration laws.⁸⁶

Conversely, those against the legislation argue that the only way to alter the policy is through amending the Constitution.⁸⁷ The concept of *jus soli* as an inclusive right is supported by judicial precedent, history, case law, and executive branch interpretation of the Fourteenth Amendment.⁸⁸ Those who oppose the legislation argue that it would punish children for their parents' actions and go against the inclusive American immigration policies.⁸⁹ Critics also argue that ending birthright citizenship will not appreciably decrease illegal immigration, but will rather create more illegal immigrants.⁹⁰ They explain that the magnet for undocumented immigrants is economic opportunity; thus, more men seek to cross the border than women.⁹¹ Further, human rights supporters urge that slowly making the lives of undocumented immigrants more difficult will only increase the divide, build anti-American sentiments, and potentially stir racial tensions.⁹²

Despite the debate over birthright citizenship, *jus soli* has been a long-standing principle in the legal context and is still the law of the United States. Therefore, children of undocumented immigrants are full American citizens and receive all responsibilities and benefits of that status.

B. Mixed-Status Families and the Fears They Face

As the undocumented population and their citizen children in the United States grow, so does the phenomenon of mixed-status immigrant households where family members have different immigration statuses or citizenships. "According to the [2000] census, 85 percent of immigrant families with children are mixed legal status families—that is, families where at least one parent is a

86. *Id.* at 472–74.

87. 19 U.S. Op. Off. Legal Counsel 340, 341 (1995), available at <http://www.usdoj.gov/olc/deny.tes.31.htm>.

88. *See id.*

89. Smith, *supra* note 77, at 326.

90. NATIONAL IMMIGRATION FORUM, BIZARRE PROPOSAL TO "END" ILLEGAL IMMIGRATION 1 (2008), <http://www.immigrationforum.org/documents/PolicyWire/Legislation/110/BizarreProposals.pdf>.

91. Conor Friedersdorf, *Birthright Citizenship Wrong Target*, SAN BERNADINO COUNTY SUN, Dec. 14, 2005, available at http://www.sbsun.com/columnists/ci_3306507.

92. *Id.*

noncitizen and one child is a citizen.”⁹³ That statistic translates to one in ten American children living in mixed-status families.⁹⁴ These families can be quite complicated as they may be composed of legal immigrants, undocumented immigrants, and naturalized citizens.⁹⁵ In mixed-status families, situations are also always in flux as some members may naturalize and others may find a way to legalize their status.

Birthright citizenship gives rise to two different kinds of mixed-status families: (1) legal immigrant parents and a citizen child and (2) undocumented parent and citizen child.⁹⁶ “Both types of families may be reluctant to apply for public benefits for citizen children. Illegal immigrants are likely to fear detection and deportation or worry that use of services by their citizen children will prevent them from eventually adjusting to legal immigration status.”⁹⁷ One of the benefits that immigrant families may hesitate to utilize is the legal system⁹⁸ since undocumented immigrants may face the fear of removal.⁹⁹

C. *The Removal and Relief for the Undocumented Alien*

An undocumented immigrant who entered without inspection or overstayed the authorized time in the United States is subject to removal.¹⁰⁰ In many removal situations, the government pays for the undocumented immigrant to be removed from the United States and the immigrant is subsequently banned from the United States for a period of years unless the immigrant obtains the

93. INTEGRATION OF IMMIGRANT FAMILIES, *supra* note 43, at 15.

94. *Id.*

95. MICHAEL E. FIX & WENDY ZIMMERMANN, URBAN INST., ALL UNDER ONE ROOF: MIXED STATUS FAMILIES IN AN ERA OF REFORM 1 (1999), <http://www.urban.org/UploadedPDF/409100.pdf> [hereinafter ALL UNDER ONE ROOF].

96. *Id.* at 3.

97. *Id.* Prior to 1996, removal proceedings were referred to as exclusion proceedings or deportation proceedings. Now all proceedings to remove an alien from the United States are referred to as removal proceedings. *See* INA § 240, 8 U.S.C. § 1229a (2006).

98. MINNESOTA ADVOCATES FOR HUMAN RIGHTS, THE GOVERNMENT RESPONSE TO DOMESTIC VIOLENCE AGAINST REFUGEE AND IMMIGRANT WOMEN IN THE MINNEAPOLIS/ST. PAUL METROPOLITAN AREA: A HUMAN RIGHTS REPORT 12–15 (2004), http://www.mnadvocates.org/sites/608a3887-dd53-4796-8904-997a0131ca54/uploads/FINAL_REPORT_Dec_10_2004_2.pdf.

99. INA § 240, 8 U.S.C. § 1229a (2006).

100. INA § 212, 8 U.S.C. § 1182 (2006).

Attorney General's permission to return.¹⁰¹ Immigration courts do, however, have some options for relief for immigrants facing removal that would allow them to remain in the United States. These options include voluntary departure,¹⁰² waiver,¹⁰³ asylum,¹⁰⁴ withholding of removal,¹⁰⁵ adjustment of status,¹⁰⁶ or cancellation of removal.¹⁰⁷ Frequently, an immigrant will apply for a variety of forms of relief.

One of the most commonly used arguments made by an undocumented immigrant with citizen children is that removal will cause the U.S. citizen child exceptional or unusual hardship.¹⁰⁸ Exceptional or extremely unusual hardship is a difficult threshold to meet. It is an argument for cancellation of removal, which was adopted as a form of relief in 1996, and allows the Attorney General the discretion to cancel removal of an inadmissible or deportable alien if the alien:

- (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
- (B) has been a person of good moral character during such period;
- (C) has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3) [8 USC § 1182(a)(2), 1227(a)(2), or 1227(a)(3)], subject to paragraph (5); and

101. INA § 240B, 8 U.S.C. § 1229 (2006).

102. INA § 240(B)(a)(1), 8 U.S.C. § 1229c(a)(1). This is a procedure in which the undocumented alien pays for the ticket to be removed from the United States and departs voluntarily, which avoids the stigma of a formal removal process. *Id.* § 240B(b)(3), § 1229c(d)(1)(B). If the alien does not depart on time, however, he or she can incur a ten year bar from the United States. *Id.* § 240B(d)(1)(b), § 1229c(d)(1)(B).

103. INA § 240(B)(a)(2), 8 U.S.C. § 1229c(a)(2)(B). Waiver is a form of discretion allotted by the court. *See id.*

104. INA § 208(a), 8 U.S.C. § 1158(a) (2006). Asylum can be granted if the person qualifies as a "refugee" and there is a well founded fear of past or future persecution based on race, religion, nationality, political group, or social group. *Id.*

105. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2006). Withholding of removal is similar to asylum or Convention Against Torture allowing a person whose country is in turmoil and meets certain qualifications the right not to be removed. *See id.*

106. INA § 245, 8 U.S.C. § 1255 (2006). This allows an alien to apply to change his or her current legal status. *Id.*

107. INA § 240A(a), 8 U.S.C. § 1229b(a).

108. Thronson, *supra* note 28, at 1170.

(D) establishes that removal would result in *exceptional and extremely unusual hardship* to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.¹⁰⁹

There are a few ways parents might argue hardship to their citizen children: first, that the removal of the parent will force the parent and child to separate, which will cause hardship on the U.S. citizen child;¹¹⁰ second, that if the child leaves with the parent, the child will face hardship in the parent's home country;¹¹¹ and third, that the child will be deprived of his or her constitutional rights as a U.S. citizen.¹¹²

In the past, the courts have not placed much weight on the idea of separation; therefore, the first argument of hardship due to separation is not generally argued at great length to the court.¹¹³ It is unlikely that a parent will choose to separate from a child, and the court leaves the choice between the hardship of separation and the hardship of return to the home country to the parent.¹¹⁴ In *Olowo v. Ashcroft*,¹¹⁵ Olowo, an undocumented Nigerian citizen with U.S. citizen daughters, argued that if she and her daughters returned to Nigeria, they would face persecution and be subject to female genital mutilation (FGM).¹¹⁶ After the judge denied the claim for asylum, the court communicated concern for Olowo's intention to bring her child back to Nigeria when she knew the potential for harm.¹¹⁷ The court also stated concern for the legal rights of the children.¹¹⁸ Despite this concern, the Seventh Circuit did not take those rights into account and assumed that the

109. INA § 240A(b)(1)(A)–(D), 8 U.S.C. § 1229b(b)(1)(A)–(D) (emphasis added).

110. Thronson, *supra* note 28, at 1171.

111. *Id.*

112. *See id.* at 1189 n.120 (quoting *In re Amoury*, 307 F. Supp. 213, 215 (S.D.N.Y. 1969) (“[The child, as] an American citizen, has an uncontested legal right to remain in this country, if the order is enforced he must either suffer to be separated from his natural parents (an unlikely event in view of his tender years) or leave with them—in violation, it is contended, of his constitutional rights, privileges and immunities. In practical terms, the impact of the order expends its force as much upon the infant as upon the parents.”)).

113. *See id.* at 1171 (noting that “[h]ardship, perhaps even exceptional hardship, is unavoidable when children are forced to separate from their parents”).

114. *Id.* at 1194.

115. 368 F.3d 692 (7th Cir. 2004).

116. *Id.* at 697.

117. *Id.* at 701.

118. *Id.* at 703.

children would remain in the United States, separated from the parent.¹¹⁹

The second common argument is that the child will suffer hardship by being constructively removed to another country. In *Oforji v. Ashcroft*,¹²⁰ Oforji, an undocumented alien and citizen of Nigeria, argued that she had undergone FGM prior to entering the country and that if she was removed, her daughter, an American citizen, would be constructively removed and might also suffer FGM in Nigeria.¹²¹ The court determined that constructive deportation is a very narrow claim and that this case did not fall within the holdings created by the doctrine.¹²² The court determined that because Oforji's child did in fact have the right to remain in the United States, the court was not depriving the child of her birthright citizenship.¹²³ The court stated that Oforji's request that the court amend immigration laws was due to the undesirable consequences of the choice she had to make regarding whether or not to remove her daughter.¹²⁴

The third common argument is that removal of the parent will deprive the U.S. citizen child of his or her constitutional rights. In *In the Matter of Anaya*, citizens of Mexico with U.S. citizen children argued that deportation would cause constructive removal of their citizen children, thereby depriving the children of their constitutional rights.¹²⁵ Similarly, in *Acosta v. Gaffney*, two undocumented aliens argued that deportation would cause undue economic hardship on their U.S. citizen daughter and deprive her of her right as an American citizen to reside in the United States.¹²⁶ However, both courts ignored these constitutional arguments, as the *Acosta* court did not even address the issue and the *Anaya* court indicated that whatever rights the children had under the Constitution did not authorize the parents to be in the United States in violation of immigration laws.¹²⁷ Despite the compelling argument of abuse of constitutional rights, de facto or constructive deportation of a U.S. citizen child has not been recognized as a

119. Thronson, *supra* note 28, at 1209.

120. 354 F.3d 609, 617 (3d Cir. 2003).

121. *Id.* at 615.

122. *Id.* at 616.

123. *Id.* at 617.

124. *Id.*

125. *In re Anaya*, 14 I. & N. Dec. 488, 489 (B.I.A. 1973).

126. *Acosta v. Gaffney*, 558 F.2d 1153, 1154-55 (3d Cir. 1977).

127. *Id.* at 1157; *Anaya*, 14 I. & N. Dec. at 489.

basis to stay or prevent the deportation of the child's undocumented or otherwise ineligible parents.¹²⁸ The *Anaya* court explained that an alien does not have the right to remain indefinitely in the United States in violation of the immigration laws simply because he or she has citizen children:¹²⁹ "whatever rights the child[ren] may have under the Constitution do[es] not authorize the respondents to remain here in violation of the immigration laws."¹³⁰

But what is the policy behind these decisions? When the removal of the parent actually means that the citizen child may face constructive removal as well, the issue becomes whether the birthright citizen children should have to face the "economic, linguistic, educational, cultural, or emotional hardship by virtue of the [removal] of their parents."¹³¹ Is it unconstitutional to punish children for their undocumented parent's actions though constructive deportation? Although citizen children have not successfully shown a violation of constitutional rights in the court system through due process and equal protection,¹³² does one nevertheless exist?

In *Perdido v. INS*, the court determined that while the children of undocumented parent aliens have every right to stay in the country, the undocumented aliens do not.¹³³ The court concluded that a deportation order against parents does not deprive a child of constitutional rights and that:

[A] minor child who is fortuitously born here due to his parents' decision to reside in this country has not exercised a deliberate decision to make this country his home, and Congress did not give such a child the ability to confer immigration benefits on his parents. . . . It gave this privilege to those of our citizens who had themselves chosen to make this country their home and did not give the privilege to those minor children whose non-citizen parents made the real choice of family residence.¹³⁴

128. *Acosta*, 558 F.2d at 1158; *see also* *Aalund v. Marshall*, 461 F.2d 710, 714 (5th Cir. 1972).

129. *See, e.g., Anaya*, 14 I. & N. Dec. at 488; *Acosta*, 558 F.2d at 1158.

130. *Anaya*, 14 I. & N. Dec. at 489 (quoting *In re Lopez*, 14 I. & N. Dec. 424, 425 (B.I.A. 1973)).

131. Bill Piatt, *Born as Second Class Citizens in the USA: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35, 40 (1988).

132. *Id.* at 47 (citing *Fiallo v. Bell*, 430 U.S. 787, 794 (1977)).

133. 420 F.2d 1179, 1181 (5th Cir. 1969).

134. *Id.*

Similarly in *Dayao v. Staley*, the court held that the plaintiff, a U.S. citizen child, could show no “legal wrong” sufficient to challenge the removal of his parents, since the order of removal was directed at his alien parents.¹³⁵

In *In re Amoury*, the claimant asserted that the court would deny the undocumented aliens’ citizen child equal protection under the laws if his parents took him with them when they were deported.¹³⁶ The court, however, held that the child’s situation was not a result of discriminatory government conduct, but rather the conduct of the child’s parents that renders them deportable.¹³⁷

The policy behind allowing citizen children to be constructively deported is to prevent the creation of a loophole in U.S. immigration law.¹³⁸ The court circumscribes the rights of the citizen child by explaining that the parents’ illegal status would not affect the citizen child exercising a choice of residency once the child reached age twenty-one.¹³⁹ Despite the above mentioned cases holding that the children are not legally being punished, citizen children of undocumented parents bear the burden of deterrence, which shortchanges those American citizens of their rights.¹⁴⁰ The immigration court’s decision regarding removal therefore directly impacts two distinct rights of the citizen child: the right to live with his or her family, and the right as a citizen to be brought up in the United States, which allows for a free public education and various other benefits.¹⁴¹

IV. FAMILY LAW

A. *Minnesota Custody Determinations*

A custody proceeding in Minnesota is determined based on

135. 303 F. Supp. 16, 19 (S.D. Tex. 1969) (dismissing plaintiff’s suit for an injunction to prevent the INS from deporting his parents).

136. 307 F.Supp. 213, 216 (D.C.N.Y. 1969).

137. *Id.* at 216.

138. *See Acosta v. Gaffney*, 558 F.2d 1153, 1158 (3d Cir. 1977) (holding that the INS did not err in denying a stay of deportation order for non-citizen parents of a citizen-child because “a contrary holding would open a loophole in the immigration laws for the benefit of those deportable aliens who have had a child born alive while they were here”).

139. *Id.*

140. *See Piatt*, *supra* note 131, at 48. Rather than punishing children, the policy is intended to deter illegal immigration of their parents. *Id.*

141. *Id.* at 41.

the best interests of the child.¹⁴² The Minnesota legislature enumerated the following specific determining factors:

- (1) the wishes of the child's parent or parents as to custody;
- (2) the reasonable preference of the child, if the Court deems the child to be of sufficient age to express preference;
- (3) the child's primary caretaker;
- (4) the intimacy of the relationship between each parent and the child;
- (5) the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interests;
- (6) the child's adjustment to home, school, and community;
- (7) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
- (8) the permanence, as a family unit, of the existing or proposed custodial home;
- (9) the mental and physical health of all individuals involved; . . .
- (10) the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any;
- (11) the child's cultural background¹⁴³

While the Minnesota legislature intended that these factors be examined to determine the best interest of the child,¹⁴⁴ they were to be malleable when applied to individual situations.¹⁴⁵ Immigration status has not traditionally been used under these factors to make a Minnesota custody determination. Immigration status was considered, though, in *Olupo*, a Minnesota case, and such consideration is also occurring in other jurisdictions.¹⁴⁶

142. See MINN. STAT. § 518.17 subd. 1 (2006).

143. *Id.*

144. *See id.*

145. The statute is malleable because of the way in which the court can exercise discretion. *Id.*

146. *See infra* Part IV.E (discussing how other states address the issue of

*i. Minnesota Case Studies**a. Maria Espinoza's Story*¹⁴⁷

In domestic abuse cases, the abuser often raises the immigration status of a parent to intimidate and control the victim.¹⁴⁸ The abuser will utilize the threat of deportation in cases involving custody of a minor child. Julia Craig, with Southern Minnesota Regional Legal Services, has extensive experience representing victims of domestic abuse. Some of the cases she has been involved with emphasize the problem that occurs when the court considers the parent's immigration status. In Maria Espinoza's case, her husband violently sexually abused her throughout the marriage. Ms. Espinoza brought Orders for Protection but voluntarily dismissed them after her husband repeatedly threatened deportation. In the husband's quest to punish his wife for leaving him, he requested the assistance of a U.S. Congressman.¹⁴⁹ He asked the Congressman to have immigration officials arrest the victim. At the time of the request, the victim was staying at a shelter. Her whereabouts were relayed to the Congressman, who ordered immigration officials to arrest her, which they did. In addition, there were allegations that the husband abused the parties' daughter. The child's physician and the shelter both made reports to child protection regarding this abuse. Child protection refused to investigate once the husband informed them of his wife's immigration status. Furthermore, the prosecutor refused to pursue criminal charges against the husband for the violent sexual assault due to the victim's undocumented status.

whether or not to consider a parent's immigration status in custody determinations).

147. Telephone Interview with Julia Craig, Attorney, Southern Minnesota Regional Legal Services, in Saint Paul, Minn. (Oct. 6, 2008). The authors would like to thank Julia Craig for her assistance with this case study. For her protection, the victim's name has been changed.

148. See *infra* Part IV.C (discussing the prevalence of immigration status arguments in domestic abuse cases involving custody).

149. The authors choose not to disclose the identity of the Congressman.

*b. Her Thao's Story*¹⁵⁰

Even when the parent is documented, the abuser often raises the parent's immigration status to attempt to gain an advantage in custody proceedings. Her Thao, who is Hmong, was kidnapped by an American naturalized citizen of Hmong descent to be his bride. At the time of their marriage, Ms. Thao did not speak any English, and the parties resided in California, away from her Minnesota relatives. Her husband, who was a licensed social worker, began physically abusing Ms. Thao three months after the kidnapping. The couple had a child together and the abuse continued. Finally, after a week of escalating abuse, Ms. Thao fled with her child to Minnesota. She left a recorded message explaining why she and their daughter went to Minnesota. Upon her arrival in Minnesota, one of her relatives informed Ms. Thao's husband of the whereabouts of both Ms. Thao and her daughter, and that they were safe. According to Ms. Thao, it is customary in Hmong cultural practice to relay such information. The parties spoke to each other shortly thereafter and the husband threatened to have Ms. Thao deported if she did not return to him and that he would have their daughter taken away from her. Her husband then flew to Minnesota and demanded that the relatives tell him where Ms. Thao and their daughter were staying. Her relatives refused to do so but tried to persuade Ms. Thao to speak to her husband regarding their "problems." Ms. Thao refused because she feared for her and her daughter's safety.

Ms. Thao then filed for an Order for Protection in Minnesota. Unbeknownst to her at the time, her husband had filed a motion with the California courts requesting custody of the child because she had absconded with their child and he believed she would flee with the child to Thailand. He also filed a report alleging that Ms. Thao had kidnapped their child from their California home without notice. He then commenced divorce proceedings. Ms. Thao's husband returned to Minnesota for the Order for Protection hearing. He brought with him an order from a California judge awarding him temporary sole custody of their daughter. After a hearing, the Minnesota court found that Ms. Thao's husband had committed acts of domestic abuse and awarded her an Order for Protection. In addition, the Minnesota

150. Notes on file with authors. The victim's name has been changed for her protection.

court, citing its statutory obligation to give full faith and credit to the California order, ordered the party's daughter returned to Ms. Thao's husband.¹⁵¹ Furthermore, the sheriff informed Ms. Thao's attorney that there was a warrant for her arrest on federal kidnapping charges, and they needed to arrest her. Ms. Thao's attorney contacted California law enforcement to update them on the findings by the Minnesota court, and made arrangements for Ms. Thao's return to California without law enforcement intervention.

One of the threats made by Ms. Thao's husband during their marriage was the threat of deportation. Because he had petitioned immigration on her behalf, he controlled whether Ms. Thao would be allowed to remain in the United States. Unbeknownst to him, however, after obtaining the Order for Protection, Ms. Thao's attorney applied for protection under the Violence Against Women Act (VAWA),¹⁵² which was enacted to provide immigration protection to victims of domestic abuse.¹⁵³ The California court granted VAWA protection to Ms. Thao and dismissed federal kidnapping charges; the court also granted Ms. Thao custody of her child and ordered her husband to pay spousal maintenance and child support.

c. Conclusions on the Case Studies

Julia Craig has seen similar reactions in cases when the abuser informed child protection officials and prosecutors of the victim/party's undocumented status. The Thao case also shows the extent to which an abuser will go to maintain control over the victim, even if the victim is not undocumented. These cases leave us with the question of why the mother's immigration status would supersede the safety and well-being of a child victim.

B. Interplay of Immigration Laws in Family Law Decisions

Some courts do, in fact, take immigration status into account and have been doing so with more frequency. What happens when courts account for the immigration status in family court decisions? David B. Thronson, whose work focuses on jurisdictions where this situation is prevalent, suggests that there are four categories into

151. See MINN. STAT. § 518D.203 (2006).

152. Violence Against Women Act, 42 U.S.C. §§ 13925–14045 (2006).

153. See *infra* Part IV.C.

which family court decisions can be placed in regard to their treatment of immigration status: (1) Discrimination; (2) Manipulation; (3) Obfuscation; and (4) Accommodation.¹⁵⁴ In the “Discrimination” category, the family court judge refuses to grant custody to the undocumented parent because the judge has a problem with the immigration status, or orders the undocumented parent to show steps toward correcting the status situation.¹⁵⁵ In the “Manipulation” category, Thronson indicates that family courts attempt to achieve certain immigration results by entering particular orders to assist an undocumented immigrant in obtaining the status necessary.¹⁵⁶ With “Obfuscation,” the court relies on other reasons as a pretext for a decision primarily based on immigration status.¹⁵⁷ Finally, with “Accommodation,” the court responds to the consequences of the status.¹⁵⁸

C. *The Impact of Domestic Violence*

Immigrant women are often victims of domestic violence.¹⁵⁹ When Congress enacted the VAWA in 1994, it stated that one of the Act's purposes is to allow “battered immigrant women to leave their batterers without fearing deportation.”¹⁶⁰ The Act's legislative history notes that there were high levels of abuse where immigrants' immigration status depended on their spouses.¹⁶¹ In 2000, Congress passed a new version of the VAWA, recognizing that abusers exercise continued control over the victim by controlling

154. David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 45, 53 (2005).

155. *Id.* at 54.

156. *Id.* at 60.

157. *Id.* at 64.

158. *Id.* at 68.

159. See LESLYE ORLOFF ET AL., LEGAL MOMENTUM, IMMIGRANT WOMEN PROGRAM, BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS: COUNTERING ABUSER'S ATTEMPTS TO RAISE IMMIGRATION STATUS OF THE VICTIM IN CUSTODY CASES 2 (2004), available at http://www.legalmomentum.org/site/DocServer/www6_1_Immigration_Status_of_the_Victim_in_Custody_Cases.pdf.

160. *Id.* (citing H.R. REP. NO. 103-395, at 26-27 (1993)).

161. *Id.* (citing H.R. REP. NO. 103-395, at 25 (1993); S. REP. NO. 101-545, at 38-39 (1990)); see generally, ROBIN L. CAMPO ET AL., FAMILY VIOLENCE PREVENTION FUND ET AL., UNTOLD STORIES: CASES DOCUMENTING ABUSE BY U.S. CITIZENS AND LAWFUL RESIDENTS ON IMMIGRANT SPOUSES (1993) (setting forth several case studies in which the immigrant-victim's immigration status depended on the abusing spouse).

the victim's immigration status.¹⁶² The 2000 version of VAWA addressed the "residual immigration law obstacles standing in the path of battered immigrant spouses and children seeking to free themselves from abusive relationships that either had not come to the attention of the drafters of VAWA 1994 or have arisen since as a result of 1996 changes to immigration law."¹⁶³

The undocumented status of a victim could be due to the abuser.¹⁶⁴ For example, an abuser holding a work-based temporary visa may refuse to file immigration papers for the victim, or jeopardize the victim's marriage, controlling the victim's ability to legally remain in the United States.¹⁶⁵ Abusers keep victims without legal status or assist in causing revocation of previously granted legal status, "and then use the victims' lack of legal status, or lack of permanent legal status, and threats of deportation to keep them from calling the police about the abuse, seeking a protection order to stop the abuse, or talking to anyone about the abuse."¹⁶⁶

Undocumented immigrant victims fear deportation, which is often threatened by the abuser to maintain his¹⁶⁷ power and control.¹⁶⁸ In custody cases, when the abuser raises the argument of the other parent's undocumented immigration status, it is not only an attempt to shift the focus away from the abuser's violent acts,¹⁶⁹ but it also is evidence of continuing abuse.¹⁷⁰ If successful, "the best interests of the child are compromised when this action results in the court placing the child in the custody of the abusive parent."¹⁷¹

Not only do undocumented immigrants have a fear of deportation,¹⁷² but the victims also have a fear that they will lose

162. Trafficking Victims Protection Act of 2000, H.R. 3244, 106th Cong. (2000) (incorporating the Violence Against Women Act of 2000), 146 CONG. REC. S10195 (daily ed. Oct. 11, 2000).

163. *Id.*

164. There are reasons unrelated to the abuser that also exist as to the reason for the victim's undocumented immigration status. For example, an immigrant who comes to the United States illegally through obtaining false papers while in his or her home country.

165. ORLOFF ET AL., *supra* note 159, at 8.

166. *Id.* at 3.

167. The authors use the pronoun "his" although the authors recognize that perpetrators of domestic abuse include both sexes.

168. ORLOFF ET AL., *supra* note 159, at 8.

169. HOWARD DAVIDSON, THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE A.B.A. 20 (1994).

170. ORLOFF ET AL., *supra* note 159, at 8.

171. *Id.* at 4.

172. *See supra* Part III.B.

their children or lose access to their children as a result of their immigration status.¹⁷³ The victims' fear of losing their children or losing access to their children is realized when abusers raise the victims' undocumented status in custody cases in order to gain an advantage.¹⁷⁴ Furthermore, it is twice as likely that fathers who abuse their children's mother will request sole physical custody compared to non-abusive fathers.¹⁷⁵ When courts validate an abuser's argument that custody should be awarded to him due to the other parent's undocumented status, courts "perpetuate[] the abuser's control over the victim and dependent children and enhance[] danger to the children rather than offering them protection."¹⁷⁶ In addition, it "flies in the face of the 'best interest' standard because it claims that it is better for children to live with an abusive person rather than a non-abusive parent who may lack legal immigration status or permanent legal immigration status."¹⁷⁷ Moreover, when an abuser attempts to raise the other parent's immigration status in a custody proceeding, the court should view this attempt as direct evidence of domestic violence.¹⁷⁸

D. *Olupo Revisited*

There are two possible categories into which one can place the *Olupo* case. One possibility is that the court viewed immigration status as connected to the flight risk factor and therefore discriminated against the mother by using her immigration status in the decision. The *guardian ad litem* suggested visitation with restrictions because of many of the reasons cited within the decision.¹⁷⁹ Nonetheless, the court explicitly stated that immigration status was a factor in determining that the custody would not change.¹⁸⁰ The other possibility is that the court decided

173. Marry Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 302 (2000).

174. ORLOFF ET AL., *supra* note 159, at 2.

175. *Id.* at 3 (citing AMERICAN PSYCHOLOGICAL ASSOCIATION, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE (1996)).

176. ORLOFF ET AL., *supra* note 159, at 3.

177. *Id.* at 5.

178. *Id.* at 10.

179. *Olupo v. Olupo*, No. C8-02-109, 2002 WL 1902892, at *3 (Minn. Ct. App. Aug. 20, 2002).

180. *Id.* at *3.

to utilize the fact that the best interest of the child standard is malleable in Minnesota, and therefore clustered immigration status under one of the factors.¹⁸¹ The court thus obfuscated the true reason for the decision.

Yet from another perspective, these categories place courts in extremely difficult situations. If the court does not consider immigration status because it is not one of the explicit factors in the best interest of the child, it could potentially place a child in the custody of an illegally present parent who could be removed, or to a parent who may be a flight risk. However, if the court does consider immigration status, it risks criticism of bias.

E. Other States' Considerations of Immigration Status

Courts throughout the United States have dealt differently with the issue of whether or not to consider a parent's immigration status in making a custody determination. Contradictions even emerge in some jurisdictions over whether a parent's immigration status should be considered. For example, in 2007, the Kentucky Court of Appeals affirmed an order in *Ramirez v. Ramirez* that considered a father's immigration status.¹⁸² Only six months later, the same court expressly refused to consider the immigration status of a father in an unrelated case, *Collins v. Santiago*.¹⁸³ In the *Ramirez* case, the father asserted "that the trial court improperly considered his immigration status in its designation of a residential custodian."¹⁸⁴ In this case, there was an order directing the father to produce documentation showing his immigration status.¹⁸⁵ The father failed to do so but admitted he did not have a driver's license or social security number.¹⁸⁶ When asked if he was an illegal alien, he pled the Fifth Amendment.¹⁸⁷ The district court held that the father's "likely status as an illegal alien was significant . . .

181. MINN. STAT. § 518.17 subdiv. 1 (2006). The statute is malleable because of the way in which the court can apply discretion. *Id.*

182. No. 2006-CA-000010-ME, 2007 WL 1192587, at *4 (Ky. Ct. App. Apr. 13, 2007).

183. No. 2007-CA-00391-MR, 2007 WL 3037762, at *2 (Ky. Ct. App. Oct. 19, 2007). Interestingly, for the two decisions, one judge sat on both cases. *Id.*; *Ramirez*, 2007 WL 1192587.

184. *Ramirez*, 2007 WL 1192587, at *1.

185. *Id.*

186. *Id.*

187. *Id.*

because of the danger of deportation.”¹⁸⁸

In *Collins*, unlike the *Ramirez* case, no request to determine the father's immigration status existed.¹⁸⁹ The Kentucky Court of Appeals therefore took the position that the father's immigration status had not been determined.¹⁹⁰ The court, however, held that the jurisdiction of Kentucky's family courts does not include immigration issues.¹⁹¹ In its decision, the court stated “[i]t is not the role of the Circuit Court to address [the father's] immigration status, except in his capacity to care and provide for his children.”¹⁹² The court concluded “[w]e are not in the business of depriving children of the benefit of two parents based solely on the immigration status of either.”¹⁹³ The court stated that doing so “would have adverse effects on our children and community alike.”¹⁹⁴ It is difficult to reconcile these two decisions, and therefore the position that Kentucky courts take on this issue is uncertain.

In *In re Duenas*, the mother alleged that the district court “placed too much weight on her undocumented status when making the custody determination.”¹⁹⁵ The Iowa Court of Appeals held that the mother's immigration status was only one factor among many others.¹⁹⁶ The court did not provide any guidance as to why the mother's immigration status should be considered in the custody determination. The court did, however, specifically note the father's immigration status: “Jose is a legal and permanent resident of this country.”¹⁹⁷

Similarly, in *Rory H. v. Mary M.*, New York's Supreme Court, Appellate Division, affirmed an award of custody to a mother, holding that the family court had carefully considered all the evidence in the record.¹⁹⁸ The evidence included testimony regarding the citizenship and immigration status of the parents and

188. *Id.*

189. *Collins v. Santiago*, No. 2007-CA-00391-MR, 2007 WL 3037762, at *1 (Ky. Ct. App. Apr. 13, 2007).

190. *Id.* at *1.

191. *Id.* at *2.

192. *Id.*

193. *Id.*

194. *Id.*

195. *In re Duenas*, No. 05-1751, 2006 WL 3314553, at *3 (Iowa Ct. App. 2006).

196. *Id.*

197. *Id.*

198. 786 N.Y.S.2d 195, 195–96 (N.Y. App. Div. 2004).

the child.¹⁹⁹ The court, however, did not provide any reasoning for the inclusion of the parents' and the child's citizenship and immigration status. It is difficult to determine the role a parent's immigration status plays in custody determinations when the court does not provide guidance.

In a separate New York decision, *Ish-Shalom v. Wittmann*, the father appealed the district court's decision awarding custody of the children to the mother and not awarding the parties joint custody.²⁰⁰ The court provided three reasons why the family court's failure to award joint custody was incorrect.²⁰¹ First, the mother's immigration status was "questionable at best."²⁰² Second, the mother had moved the children from New York to Florida in violation of the family court order.²⁰³ Third, the father, as non-custodial parent, could not petition for the return of the children under the Hague Convention on International Child Abduction.²⁰⁴

In *Rico v. Rodriguez*, the Nevada Supreme Court held, in a case of first impression, that a district court has discretion to consider a parent's immigration status and its derivative effects in determining custody.²⁰⁵ The court stated: "as with all balancing tests, the district court must weigh each factor that may affect the consequences of placement."²⁰⁶ The court held that the mother's due process rights were not violated because the district court's decision did not turn primarily on her immigration status.²⁰⁷ The result of *Rico* is that Nevada courts will now consider a parent's immigration status to determine custody.

199. *Id.* at 195.

200. 797 N.Y.S.2d 111, 112 (N.Y. App. Div. 2005).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* See *infra* Part V.B (discussing the Hague Convention on International Child Abduction). This holding has not been reached by other circuits. Specifically, the Eighth Circuit has held that courts must determine the following when deciding whether a child was wrongfully removed under the Hague Convention on International Child Abduction: "when the removal or retention took place, what the habitual residence of the child was immediately prior to the removal, whether the removal or retention violated the petitioner's custody rights under the law of habitual residence, and whether the petitioner was exercising those rights at the time of the removal." *Barzilay v. Barzilay*, 536 F.3d 844, 847 (8th Cir. 2008).

205. 120 P.3d 812, 816 (Nev. 2005).

206. *Id.*

207. *Id.* at 818.

V. INTERNATIONAL COMPONENT

International law plays another important role in this complex web of legal issues. Family relationships develop across cultural and national boundaries as our society becomes more global.²⁰⁸ These relationships result in bi-national marriages that often have conflicting cultural and religious beliefs.²⁰⁹ If these unions dissolve, the implications of that dissolution create even more complex legal problems.²¹⁰ In some cases, a parent may abduct his or her child based on a belief that it is in the child's best interest, or on the other end of the spectrum, to punish the other parent.²¹¹ Other parents may abduct children to reaffirm their own self-worth, secure the child's adherence to certain beliefs, or to pressure the other parent in an impending divorce.²¹²

There is a growing prevalence of international child abduction in the United States.²¹³ There have been about 16,000 children either abducted from the United States, or prevented from returning by one of their parents, since the late 1970s.²¹⁴ As of 2004, 10,000 American children lived abroad as victims of parental child abduction.²¹⁵ Because of the increase in the child abduction phenomenon, countries must establish policies and procedures to deter parents from stealing children for revenge or leverage.²¹⁶

A. *The Domestic Laws for Child Abduction*

The United States has two domestic laws prohibiting interstate parental child abduction. The Uniform Child Custody Jurisdiction

208. Patricia E. Apy, *Managing Child Custody Cases Involving Non-Hague Contracting States*, 14 J. AM. ACAD. MATRIM. LAW. 77, 77 (1997).

209. *Id.*

210. *Id.* at 78.

211. Laura McCue, *Left Behind: The Failure of the United States to Fight for the Return of Victims of International Child Abduction*, 28 SUFFOLK TRANSNAT'L L. REV. 85, 87 (2004).

212. *Id.*

213. The State Department reported 6,744 cases of international child abduction by a parent from 1976 to 1996. Deborah M. Zawadzki, *The Role of Courts in Preventing International Child Abduction*, 13 CARDOZO J. INT'L & COMP. L. 353, 353 (2005).

214. *Id.* For more information on international parental child abduction, see U.S. Department of State, International Parental Child Abduction, http://travel.state.gov/family/abduction/abduction_580.html (last visited Dec. 13, 2008).

215. McCue, *supra* note 211, at 85.

216. *Id.* at 88, 102.

Act (UCCJA)²¹⁷ and the Parental Kidnapping Prevention Act (PKPA)²¹⁸ help obtain children abducted across state lines. These laws, however, do not provide a remedy for international child abduction.²¹⁹

In 1993 Congress enacted the International Parental Kidnapping Crime Act (IPKCA) that criminalizes the wrongful removal of a child outside the United States.²²⁰ While this law is promising, IPKCA is problematic because it is an American law that is binding only within the United States and not automatically recognized or enforced abroad.²²¹ Therefore, it is of little assistance in international child abduction situations.²²² International instruments have therefore been enacted to address the concerns of international child abduction.

B. The International Remedy for Child Abduction

In 1976, twenty-three nations met at the Hague Conference on Private International Law.²²³ Those nations recognized international child abduction as a serious issue and agreed to draft a treaty addressing the abduction of children across country lines.²²⁴ Between 1976 and 1980, the countries prepared what is now commonly referred to as the “Hague Convention.”²²⁵

The Hague Convention on the Civil Aspects of International Child Abduction was implemented on October 25, 1980 as a means

217. 9(IA) U.L.A. 271 (1999). The UCCJA was amended in 1997 and renamed the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA); the amended version has now been adopted by 46 states and the District of Columbia. 9(IA) U.L.A. 649 (Supp. 2008).

218. 28 U.S.C. § 1738A (2000).

219. The UCCJA was adopted in the attempts to combat parental kidnapping. Susan L. Barone, *International Parental Child Abduction: A Global Dilemma with Limited Relief—Can Something More Be Done?*, 8 N.Y. INT’L L. REV. 95, 98 (1995). Under the UCCJA, jurisdiction is determined based on the “home state” and the best interests of the child, and courts are required to recognize and enforce custody decrees from other states. *Id.* The PKPA works with the UCCJA; it does not require courts in the U.S. to honor foreign custody decrees. *Id.* at 99. These laws provide no remedy for international abduction cases. *Id.*

220. International Parental Kidnapping Crime Act of 1993, 18 U.S.C. § 1204 (2000) (amended Pub. L. No. 108-21, Title I, § 107, 117 Stat. 655 (2003)).

221. Barone, *supra* note 219, at 100–01.

222. *Id.* at 100.

223. U.S. Dep’t of State, Possible Solutions: Using the Hague Abduction Convention, http://travel.state.gov/family/abduction/Solutions/Solutions_3854.html (last visited Dec. 13, 2008).

224. *Id.*

225. *Id.*

of recovering children who were abducted abroad.²²⁶ The countries that are part of the Hague Convention aid parents in returning the child or in exercising visitation rights.²²⁷ The Hague Convention is a mechanism specifically for parents “seeking the return of, or access to, their child through lawful means.”²²⁸ The Hague Convention states that “[a]ny person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child’s habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.”²²⁹

The Hague Convention did not take effect in the United States until July 1, 1988.²³⁰ Fifty nations have signed the Hague Convention, promising to try to return the abducted child to the child’s original country.²³¹ The Hague Convention creates a civil

226. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, *available at* http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=24 (last visited Nov. 12, 2008) [hereinafter Hague Convention].

227. *Id.*

228. DEPARTMENT OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 49 (2008), <http://travel.state.gov/pdf/2008HagueAbductionConventionComplianceReport.pdf>.

229. Hague Convention, *supra* note 226, at art. 8.

230. *See* Exec. Order No. 12,648, 53 Fed. Reg. 30,637 (1988), *reprinted as amended in* 42 U.S.C. § 11606 at 496–97 (2004).

231. *See* Hague Abduction Convention Country List, http://travel.state.gov/family/abduction/hague_issues/hague_issues_1487.html (last visited Nov. 14, 2008). The signatory nations and their dates of entry into force with the U.S. are: Argentina (June 1, 1991); Australia (July 1, 1988); Austria (Oct. 1, 1988); Bahamas (Jan. 1, 1994); Belgium (May 1, 1999); Belize (Nov. 1, 1989); Bosnia-Herzegovina (Dec. 1, 1991); Brazil (Dec. 12, 2003); Bulgaria (Jan. 1, 2005); Burkina Faso (Nov. 1, 1992); Canada (July 1, 1988); Chile (July 1, 1994); Colombia (June 1, 1996); Costa Rica (Jan. 1, 2008); Croatia (Dec. 1, 1991); Cyprus (Mar. 1, 1995); Czech Republic (Mar. 1, 1998); Denmark (July 1, 1991); Dominican Republic (June 1, 2007); Ecuador (Apr. 1, 1992); El Salvador (June 1, 2007); Estonia (May 1, 2007); Finland (Aug. 1, 1994); France (July 1, 1988); Germany (Dec. 1, 1990); Greece (June 1, 1993); Honduras (June 1, 1994); Hong Kong Special Admin. Region (Sept. 1, 1997); Hungary (July 1, 1988); Iceland (Dec. 1, 1996); Ireland (Oct. 1, 1991); Israel (Dec. 1, 1991); Italy (May 1, 1995); Latvia (May 1, 2007); Lithuania (May 1, 2007); Luxembourg (July 1, 1988); Macau (Mar. 1, 1999); Former Yugoslav Republic of Macedonia (Dec. 1, 1991); Malta (Feb. 1, 2003); Mauritius (Oct. 1, 1993); Mexico (Oct. 1, 1991); Monaco (June 1, 1993); Montenegro (Dec. 1, 1991); Netherlands (Sept. 1, 1990); New Zealand (Oct. 1, 1991); Norway (Apr. 1, 1989); Panama (June 1, 1994); Paraguay (Jan. 1, 2008); Peru (June 1, 2007); Poland (Nov. 1, 1992); Portugal (July 1, 1988); Romania (June 1, 1993); San Marino (Jan. 1, 2008); Serbia (Dec. 1, 1991); Slovak Republic (Feb. 1, 2001);

remedy. A state actor may only become bound to the Convention by creating a domestic law that adopts the treaty and a central authority that administers the Hague Convention objectives.²³² The enabling legislation in the United States is the International Child Abduction Remedies Act (ICARA).²³³

The Hague Convention provides relief for the “left behind parent” if the parent can meet the requirements set out in the Hague Convention by a preponderance of evidence.²³⁴ The parent must show the following:

- (1) Home and foreign states must be signatories to the Hague Convention;
- (2) The child must be under the age of sixteen;
- (3) There must be a wrongful removal or retention as a violation of a custody right; and
- (4) The home state must be the child’s habitual residence.²³⁵

C. *Limitations of the Hague Convention*

While the Hague Convention is a step in the right direction, if the requirements are not met the remedy cannot be obtained; therefore, there are limitations.²³⁶ First and foremost, about two-thirds of the world’s countries are not parties to the Hague Convention, yet relief is only granted to those countries that are parties.²³⁷ Second, some countries that are parties are not fully compliant in upholding their duty.²³⁸ Third, certain exceptions allow the court to deny a request to return the child to the original country—most notably the one-year exception that requires the parent to file and locate the child within one year in order to receive relief.²³⁹ If the Hague Convention does not apply, the “left

Slovenia (Apr. 1, 1995); South Africa (Nov. 1, 1997); Spain (July 1, 1988); Sri Lanka (Jan. 1, 2008); St. Kitts and Nevis (June 1, 1995); Sweden (June 1, 1989); Switzerland (July 1, 1988); Turkey (Aug. 1, 2000); Ukraine (Sept. 1, 2007); United Kingdom (July 1, 1988); Uruguay (Sept. 1, 2004); Venezuela (Jan. 1, 1997); Yugoslavia, Federal Republic of (Dec. 1, 1991); and Zimbabwe (Aug. 1, 1995). *Id.*

232. Barone, *supra* note 219, at 101.

233. Zawadzki, *supra* note 213, at 356.

234. Barone, *supra* note 219, at 108.

235. *Id.* at 105–06.

236. *Id.* at 104.

237. McCue, *supra* note 211, at 96.

238. Zawadzki, *supra* note 213, at 358.

239. *Id.* at 359 n.50.

behind parent" is forced to pursue the child under the foreign system, which may be more lenient toward its nationals.²⁴⁰

D. Prevention Measures—How Far Should We Go?

Given the limitations of the Hague Convention, the question becomes whether courts should implement precautionary procedures in cases where a parent is a flight risk. In other words, should the court consider whether an international party in a custody dispute is a party to the Hague Convention?

Minnesota case law covered this point in *In re Al-Zouhayli*, a case regarding visitation with a party that was a potential flight risk.²⁴¹ The court balanced the harm caused by supervised visitation with the risk of abduction when the country in question was not a party to the Hague Convention.²⁴² The court noted that it would be unlikely that an abducted child would be recovered.²⁴³

The Department of Justice speaks directly to this issue in its recommendations for practice in a report on international kidnapping.²⁴⁴ It states that judges should use preventative measures determined by the level of risk and likelihood of recovery.²⁴⁵ Some of the risk factors for abduction include a strong support network, a lack of marital stability or cooperation between parties, and lack of incentive to remain in the area.²⁴⁶ The practices recommended by the Department of Justice in dealing with high flight risk²⁴⁷ candidates are the following: require the custody order

240. Barone, *supra* note 219, at 114.

241. 486 N.W.2d 10 (Minn. Ct. App. 1992).

242. *Id.* at 13.

243. *Id.*

244. See SUBCOMM. ON INT'L CHILD ABDUCTION OF THE FED. AGENCY TASK FORCE ON MISSING & EXPLOITED CHILDREN & THE POLICY GROUP ON INT'L PARENTAL KIDNAPPING, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, A REPORT TO THE ATTORNEY GENERAL ON INTERNATIONAL PARENTAL KIDNAPPING 7-16 (1999), available at http://www.ncjrs.gov/html/ojjdp/ojjdp_report_ip_kidnapping/index.html [hereinafter SUBCOMM. ON INT'L CHILD ABDUCTION].

245. *Id.* at 21.

246. Apy, *supra* note 208, at 84.

247. United States Custom and Border Protection (CBP), due to the "increasing incidents of child abductions in disputed custody cases and as possible victims of child pornography," recommends that children traveling without one parent have a notarized note from the parent granting permission for the child to leave the country. U.S. Customs & Border Protection, Answers: Traveling With Children, http://help.cbp.gov/cgi-bin/customs.cfg/php/enduser/std_adp.php?p_faqid=268 (last visited Dec. 13, 2008). Unfortunately, CBP does not require this

to specify that the child cannot be removed from the state or country without authorization; prevent issuance of the child's passport or require that it be surrendered; order the parent at risk of abducting to order a bond that could potentially be given to the "left-behind" parent if the parent at risk fled; and order supervised visitation.²⁴⁸

While the recommended practices speak clearly to the issue at hand, the answer to the question of the likelihood that an abducted child would be recovered is difficult because consideration of the national origin of a party may cause courts to treat international parties in different and unequal ways, based on their origin. That concern, however, is balanced by the potential of flight to a country that provides no remedy for the "left behind parent" with the custody order.

VI. ANALYSIS AND CONCLUSION

A. *Reasons for Not Considering Immigration Status*

There are three basic reasons why immigration status should not be considered in the best interest factors governing a custody decision. They include maintaining the parent-child relationship, avoiding a violation of human rights, and fostering a fear of removal.

There is an intentional divide between family law and immigration law. The fundamental right to have and raise a family in the way a parent sees fit is one that must be constitutionally upheld. First, accounting for immigration status in a family law decision violates that right to parent-child relationship by intruding on the fundamental liberty right to raise one's children. Immigration status has nothing to do with the parent-child relationship and the ability to parent. Considering immigration status would harm the child's best interest by potentially taking away the more competent parent. For example, in *Olufo*, the

type of documentation, but in the event that a parent is asked, and is unable to produce documentation showing permission to leave the country with the child, the parent and child may be detained until "the circumstances of the child traveling without both parents can be fully assessed." *Id.* Even so, many other countries require this documentation, and "failure to produce notarized permission letters and/or birth certificates could result in [the parent and child] being refused entry." *Id.*

248. SUBCOMM. ON INT'L CHILD ABDUCTION, *supra* note 244, at 21.

children were denied unsupervised visitation with their mother despite the fact that the guardian ad litem had recommended such visitation to the court.²⁴⁹

Second, using immigration status as a factor blatantly violates the human rights of undocumented immigrants by treating immigrants as second class citizens.²⁵⁰ Additionally, it could potentially violate the constitutional rights of the U.S. citizen child. In *Olupo*, the court denied the mother the right to unsupervised visitation.²⁵¹ That, in turn, treated the mother differently in family court because of her immigration status.

Finally, the concept of considering immigration status either as an express factor, or implicitly within the malleable factors, would preclude parties from bringing cases out of fear of removal. This in turn could work against the measures already in place to aid battered immigrant women.

B. Reasons for Considering Immigration Status

Contrarily, there are strong arguments for the importance of considering immigration as a factor in determining custody. Those arguments include the potential for removal, and the potential of depriving the child of the right to live in the United States.

The fact that it is not in the best interest of a child to be in the custody of a parent who could be removed is one of the strongest arguments. Family court laws are in place to help aid stability in the life of a minor child. Removal is the antithesis of stability.

Second, the removal of a parent in turn could constructively remove the child from the United States. A birthright citizen child has the legal right to live in the United States and depriving the child of the opportunity to live in the United States also deprives the child of a free education and other benefits enjoyed by American citizens. This is a dangerous argument to make because it is ethnocentrically charged; however, custody decisions have accounted for the safety and potential for growth of a child, and this argument clings to that concept.

249. *Olupo v. Olupo*, No. C8-02-109, 2002 WL 1902892, at *2 (Minn. Ct. App. Aug. 20, 2002).

250. See generally Piatt, *supra* note 131.

251. *Olupo*, 2002 WL 1902892, at *1.

C. Conclusion

An abuser, because he knows the victim's immigration status, will often threaten her by telling her that he will have her deported. The victim's fear of deportation is a real fear, as illustrated by the Maria Espinoza case study. When courts consider the undocumented parent's immigration status, those courts sanction the threat of deportation by an abuser as a tool to further intimidate and harass the victim. Moreover, a parent's immigration status has no bearing on his or her ability to raise, nurture, and care for his or her children. In conclusion, family courts should not consider an undocumented parent's status in determining custody of a minor child.